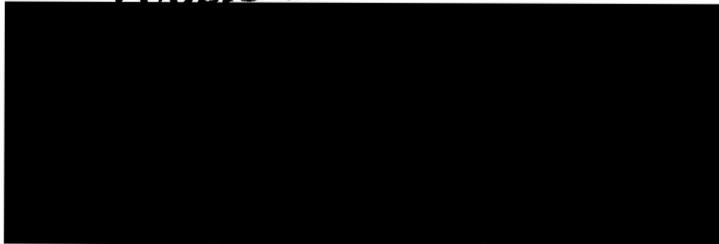




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FILE: [redacted]  
EAC-03-091-50927

Office: VERMONT SERVICE CENTER

Date: **MAY 12 2008**

IN RE: Petitioner: [redacted]  
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Acting Director (Director), Vermont Service Center. The director subsequently revoked the approval of the petition after issuing a notice of intent to revoke the approval of the petition (NOIR). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a telecommunications networking company. It seeks to employ the beneficiary permanently in the United States as a vice president (executive director). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The petitioner filed the instant petition on December 20, 2002 and the director approved the petition on December 10, 2003. In connection with results of the beneficiary's application to adjust status to lawful permanent resident, the director served the petitioner with the NOIR on February 9, 2006. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because she determined that the beneficiary and the employer are one and the same, and that it would appear as if the United States company was organized to provide an avenue for the beneficiary to seek admission into the United States as an immigrant.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 28, 2006 NOR, the primary issue in this case is whether or not the petitioner and the beneficiary are one and the same and thus the petition is a self-petition filed by the beneficiary.

Section 205 of Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On appeal, counsel asserts that the instant petition is not a self-petition and the petitioner is a separate corporation, and thus the petitioner and the beneficiary are not one and the same, and that there is no evidence showing the petitioning entity was organized to seek immigration for the beneficiary, and therefore, the approval of the petition was improperly revoked.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the

On appeal, counsel submits a brief arguing that it is well established by statute and case law that a corporation is a legal entity separate from its owners, and the petitioner is a separate legal entity, and the director's decision that the petitioner was organized for the beneficiary to seek immigrant benefits was not supported by any evidence. Relevant evidence in the record includes the petitioner's corporate establishment documentation, the petitioner's tax return for 2001,<sup>2</sup> and a letter dated August 27, 2004 from [REDACTED] C. pertinent to the petitioner's ownership.

In the instant case, Net Connection Corporation filed a labor certification application on behalf of the beneficiary for the position of executive director with DOL on April 27, 2001 and it was certified to Net Connection Corporation by DOL on May 15, 2002. On December 30, 2002, Net Connection Corporation filed the instant petition on behalf of the beneficiary based on the relevant certified labor certification with the Vermont Service Center. Therefore, the employer of the labor certification and the petitioner of the instant I-140 petition are Net Connection Corporation. The record does not contain any evidence showing that the beneficiary filed the instant petition for himself. The articles, certificates and the 2001 tax return of the petitioner in the record show that the petitioner is a corporation. This office also accessed the Virginia State Corporation Commission official corporation database and found that the petitioner is registered as a corporation doing business in Virginia.<sup>3</sup> Although it is also noted that the director correctly noted that the petitioner's tax return for 2001 indicated that the beneficiary owned 99% of the stock of the petitioner, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The fact that the beneficiary owns 99% of the petitioner's stock does not change the petitioner's separate and independent status, and the petitioner is still a separate entity from the beneficiary. The AAO has not found any evidence in the record showing that the petitioner was organized solely to provide an avenue for the beneficiary to immigrate to the United States. Therefore, the AAO concurs with counsel's assertion and determines that the director did not indicate good and sufficient cause to revoke the approval of this petition in her decision, and thus the director's April 28, 2006 NOR is herewith withdrawn.

However, beyond the director's decision and counsel's assertions on appeal, the petitioner has not established that the petition was based on a *bona fide* job offer. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The petitioner in the instant case is Net Connection Corporation and Form 1120, U.S. Corporation Income Tax return, for 2001 submitted in the record shows that the tax return was filed by NCC, Inc. dba Net Connection Corporation. Therefore, the AAO assumes that NCC, Inc. and the petitioner are the same one business entity for the purpose of adjudicating the instant petition and accepts the tax return filed by NCC, Inc. dba Net Connection Corporation as the petitioner's.

<sup>3</sup> *See* <http://www.scc.virginia.gov/division/clk/diracc.htm> (accessed on April 7, 2008).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date.

Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In this case, the petitioner's tax return for 2001 shows that the beneficiary owned 99% of the common stock of the petitioner. The record contains a letter dated August 27, 2004 from [REDACTED] pertinent to the ownership of the petitioner. Pursuant this letter, the beneficiary owned 100 shares of the petitioner during the period from December 15, 2000 to May 21, 2001 and 990 shares during the period from May 22, 2001 to July 31, 2003, and the beneficiary has owned 100 shares again since August 1, 2003. Counsel did not submit any objective evidence to support these assertions. Although the assertions of counsel do not constitute evidence, *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), the assertion that the beneficiary owned 99% of the petitioner's shares at the end of 2001 is supported by the petitioner's 2001 tax return.<sup>4</sup> Even if the rest of the contents of the letter dated August 27, 2004 from [REDACTED] had been proven, the petitioner was 99% owned by the beneficiary in the year of the priority date, the year the petitioner provided the job offer to the beneficiary, and the beneficiary would still own 10% of the petitioner's common stock. Therefore, the job offer by the petitioner to the beneficiary was not a *bona fide* offer, and thus the petitioner failed to establish that the job offer to the beneficiary was a *bona fide* offer and a realistic one.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

The record shows that the petitioner has two shareholders: [REDACTED] (the beneficiary's nickname) and [REDACTED]. When one of them owns majority shares in a period, the other shareholder owns the rest of shares. However, the record contains an affidavit of [REDACTED] and a completed Form I-864 Affidavit of Support issued by [REDACTED] which show that [REDACTED] is the brother of the beneficiary in the instant case and that they are living at the same address. A sibling relationship between the majority shareholder of the petitioner and the beneficiary raises doubt as to whether the job offer is a *bona fide* job offer. The record does not contain any evidence showing that the petitioner disclosed the sibling relationship between the majority shareholder and the beneficiary in any stage of the labor certification application process.

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<sup>4</sup> The articles of incorporation of the petitioner indicate that the petitioner issued a total of 1000 shares of common stock. The 990 shares the beneficiary owned during the period from May 22, 2001 to July 31, 2003 consist of 99% of the petitioner's common stock.

The relevant certified Form ETA-750 was filed on April 27, 2001 and the job offered was an “executive director,” and DOL assigned the occupational code of 189.117-034, vice president, the closest type of occupation as the proffered position. On the Form ETA 750B, the beneficiary claimed that he had been working 35 hours per week for the petitioner in the proffered position since January 2000. However, the record contains evidence showing that the beneficiary has been the president and/or chief executive officer (CEO) of the petitioner. The petitioner’s 2001 tax return in the record was signed by the beneficiary as the president, and the Schedule E of the Form 1120 for 2001 not only indicates that the beneficiary owns 99% of the petitioning corporation’s common stock, but also shows that the beneficiary devoted 30% of his time to the business, not on a full-time base as alleged by the petitioner and the beneficiary. The beneficiary signed the shareholder’s agreement entered into by and between [REDACTED]

[REDACTED] and [REDACTED] Infotech on January 28, 2002 on behalf of the petitioner as its CEO. Citizenship and Immigration Services (CIS) records shows that the petitioner filed three I-129 nonimmigrant petitions in 2004, 2005 and 2007 respectively<sup>5</sup>, all of which were signed by the beneficiary as the president of the petitioner. The Virginia State Corporation Commission’s official corporation database lists the beneficiary as the petitioner’s registered agent and the petitioner’s Virginia 2008 Annual Report lists the beneficiary as CEO and was signed by the beneficiary as the CEO.<sup>6</sup> All of these documents show that the beneficiary is working for the petitioner as the president or CEO instead of as an executive director as claimed by the petitioner on the petition and labor certification. This inconsistency between the beneficiary’s current actual position and the position the petitioner offered to the beneficiary raises doubt as to whether the beneficiary would work for the petitioner in the proffered position after his permanent residence is granted.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: “After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.” Material facts to the immigrant petition’s eligibility are the beneficiary’s qualifications and the bona fides of the job offer. By willful misrepresentation of the beneficiary’s real position and role with the petitioner and concealment of the beneficiary’s relationship to the sole shareholder of the petitioner, DOL did not have accurate information concerning the bona fides of the job offer or the alien’s background during the labor certification process. The test of the U.S. labor market and other procedural and substantive aspects of the labor certification adjudication could not have been properly completed because of that willful misrepresentation of the beneficiary’s role in the petitioner and concealment of the beneficiary’s relationship to the sole shareholder.

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the

<sup>5</sup> They are EAC-04-080-53172, EAC-05-161-53043, and WAC-07-076-51383.

<sup>6</sup> See <http://www.scc.virginia.gov/division/clk/diracc.htm> (accessed on April 7, 2008).

position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

Additionally, in *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from DOL's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

It appears that the approval of the instant petition should be revoked and the underlying labor certification application should be invalidated because section 212(a)(6)(C)(i) of the Act provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured ) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." The matter will be remanded to the director to review this issue.

The second issue beyond the director's decision is whether the petitioner had demonstrated that the beneficiary possessed the requisite qualifications for the proffered position as set forth by the Form ETA 750 prior to the priority date. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 27, 2001.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The approved labor certification in the instant case requires four years of college studies, a Bachelor's Degree or equivalent in computer science and two years of experience in the job offered for the proffered position. DOL assigned the occupational code of 189.117-034, vice president, the closest type of occupation as the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=189.117-034+&g+Go> (accessed April 7, 2008) and its extensive description of the position and requirements for the position most analogous to executive director position, the position falls within Job Zone Five requiring "extensive preparation" for the occupation type of vice president position. According to DOL, a bachelor's degree is the minimum formal education required for this occupation. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree). DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means "[t]hese occupations often involve coordinating, training, supervising, or managing the activities of others to accomplish goals. Very advanced communication and organizational skills are required. Examples include librarians, lawyers, aerospace

engineers, physicists, school psychologists, and surgeons.” See <http://online.onetcenter.org/link/summary/11-1011.00#JobZone> (for chief executives, accessed April 7, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

*See id.*

An executive director position could be properly analyzed as a professional position since a bachelor’s degree is the minimum formal educational requirement.<sup>7</sup> In this case, although the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form, the petitioner claimed to seek and the director also adjudicated the petition under the skilled worker category. The AAO finds that the director improperly analyzed the instant petition under the skilled worker category. Therefore, the AAO will examine the petition under the professional category and determine whether the beneficiary meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

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<sup>7</sup> A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” It is noted that executive director positions are not included in this section.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended George Mason University in Fairfax, Virginia in the field of "Computer Science" from September 1986 to June 1990, culminating in the receipt of no degrees or certificates. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's transcripts from George Mason University, and an evaluation report from [REDACTED] Ph.D., Professor in the Department of Engineering Management and Systems Engineering of the George Washington University (Prof. [REDACTED]). The transcripts show that the beneficiary took fourteen (14) courses and earned forty-seven (47) semester hour credits during the period from the fall semester of the 1986-1987 academic year to the fall semester of the 1989-1990 academic year at George Mason University. The evaluation report from Prof. [REDACTED] states that the beneficiary completed two years of university-level training in computer science at George Mason University. However, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the petition must be denied under professional category.

The AAO finds that the beneficiary would not meet the educational requirements set forth on the Form ETA 750 and thus would not be qualified for the proffered position even if the petitioner had requested the proffered position be analyzed under the skilled worker category.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

The certified Form ETA 750 requires four years of college studies and a bachelor's degree or equivalent in computer science as the minimum educational requirements for the proffered position. The petitioner clearly required a bachelor's degree or equivalent in computer science, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees, college studies, and/or quantifiable amount of work experience.

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). The court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. See *Snapnames.com, Inc.* at 11-13. In the instant case, the evidence submitted in the record shows that all of the beneficiary's education includes the fourteen (14) courses and forty-seven (47) semester hour credits at George Mason University, which was evaluated by Prof. [REDACTED] as completion of two years of university-level training in computer science. However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's two years of college studies cannot be considered a bachelor equivalent degree. Moreover, the ETA 750 specifically requires four years of college education. The beneficiary's two years of undergraduate studies falls short of the four-year requirement.

As mentioned above, the record contains an evaluation report from Prof. [REDACTED]. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor.

The petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing. The petitioner failed to submit any documentary evidence showing that the beneficiary ever obtained a bachelor's degree or its equivalent education prior to the priority date in the instant case. Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date even under the skilled worker category.

In addition, the certified labor certification also requires two years of experience in the job offered. The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 24, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working 35 hours per week as an executive director for the petitioner in McLean, VA since January 2000. Prior to that, he represented that he worked 40 hours per week as an executive director for U.S. Surf.Net, IL, Inc. in Chicago, IL from April 1997 to January 2000, for Connectech in Springfield, VA from March 1994 to March 1997 and fro Net Sat, Inc. in Springfield, VA from May 1991 to March 1994. The beneficiary described all these four employers as telecommunications networking companies and his duties performed with these four companies with exactly same wordings. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains three experience letters from the beneficiary's former employers: [REDACTED] B of Net Sat, Inc., [REDACTED] of Connectech, and Ian Lee of U.S. Surf.Net. The experience letter from Net Sat, Inc. was dated March 12, 2002, signed by [REDACTED] as the director and on the company's letterhead. The record contains an affidavit of [REDACTED] dated March 9, 2006. This affidavit confirmed that [REDACTED] established Net Sat, Inc. in 1991 and the company was in existence from 1991 until 1994. Therefore, Net Sat, Inc. did not exist when the experience letter was issued in 2002. However, [REDACTED] did not explain how a nonexisting company provided employment verification on its letterhead. The regulation at 8 C.F.R. § 204.5(g)(1) requires evidence in the form of letter from former employer. It allows the director to consider other documentation **if an experience letter from the former employer is unavailable**. The writer used his name in the letter as [REDACTED] however, the record shows that he is the same person who provided the affidavit in the name of [REDACTED] who alleged to own majority shares of the petitioner, and who is the beneficiary's brother, [REDACTED] Bolouri. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The experience letter from Net Sat, Inc. does not verify the beneficiary's full-time employment.

The second experience letter is from Connectech. This letter was signed by [REDACTED] however, it does not include the title of [REDACTED]. Therefore, it is not clear whether [REDACTED] wrote this letter as a legally authorized representative of the company and further the AAO cannot determine whether this experience letter is from the beneficiary's former employer as required by the regulation. This letter also does not verify the beneficiary's full-time employment.

The third experience letter is from U.S. Surf.Net and was signed by [REDACTED] as human resources manager. However, like the first two letters, U.S. Surf.Net letter does not verify the beneficiary's full-time employment. In addition, all these three letters were dated March 12, 2002 and formatted exactly same except the writer's name and title, and the period the beneficiary worked. The former counsel in this case, [REDACTED], provided an affidavit to acknowledge that he provided a template for preparation of employment confirmation letters to the beneficiary's prior employers. However, Mr. Paul S. Haar did not submit any documentary evidence to support his assertion that he only provided a template, not complete drafted letters for those employers to sign. The same format of the letters creates doubt as to the validity of the experience letters.

Because of these defects, all three experience letters will be given little weight in these proceedings and the AAO cannot accept any of these letters as primary documentary evidence to establish the beneficiary's requisite two years of experience as a full-time executive director. Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of

experience as an executive director, and further failed to establish that the beneficiary is qualified for the proffered position.

The third issue beyond the director's decision is whether the petitioner established its ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$55,000 per year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since January 2000.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's 2003 tax return and paystubs from the petitioner for a period from January 1, 2004 to August 15, 2004 and for a period from January 1, 2006 to February 28, 2006. The beneficiary's 2003 individual income tax return shows that the beneficiary reported wage income of \$31,358 in the year of 2003. However, the beneficiary did not submit the attached W-2 or 1099 forms for the reported wage income. Therefore, it is not clear whether the beneficiary's wage income of \$31,358 in 2003 was paid by the petitioner. The beneficiary's paystubs for 2004 indicate that the petitioner paid the beneficiary \$2,291.67 semimonthly from January 1 to August 15, 2004, with a total paid of \$34,375.05 in 2004 as of August 15, 2004. Although the petitioner demonstrated that it paid the beneficiary at the level of the proffered wage from January 1 to August 15, 2004, the petitioner did not submit evidence showing that the petitioner continued to pay the beneficiary

at the same level during the rest of the year 2004. Therefore, the petitioner established that it paid the beneficiary \$34,375.05 in 2004, but failed to demonstrate that it paid the beneficiary the full proffered wage in 2004. The beneficiary's two paystubs in 2006 show that the petitioner paid the beneficiary \$4,583.33 monthly (at level of the proffered monthly wage) in January 2006 and February 2006 respectively. However, without further evidence, the petitioner only demonstrated that it paid the partial proffered wage in 2006. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$55,000 per year in 2001, the year of the priority date, 2002, 2003 and 2005, and the difference of \$20,624.95 in 2004 and \$45,833.34 in 2006 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Counsel asserted to consider the petitioner's depreciation of \$46,308 in 2001. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537

The record contains a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001. According to the tax return, the petitioner is structured as a C corporation and its fiscal year is based on a

calendar year. The petitioner's Form 1120 states that the petitioner had a net income<sup>8</sup> of \$23,907 in 2001. Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2001 tax return shows that the petitioner's net current assets during 2001 were \$287,567. Therefore, for the year 2001, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, the petitioner had established that it had the ability to pay the beneficiary the proffered wage in 2001 through an examination of its net current assets.

However, the record before the director closed on March 10, 2006 with the receipt by the director of the petitioner's submissions in response to the NOIR. As of that date the petitioner's federal tax returns for 2002 through 2004 should have been available, and the petitioner's annual reports or audited financial statements for 2002 through 2005 should have been available. However, the petitioner did not submit its tax returns, annual reports, or audited financial statements for these years. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns, annual reports or audited financial statements would have demonstrated the petitioner's taxable income and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 2002 through 2005 because it did not submit its tax returns or other regulatory-prescribed evidence for these years.

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<sup>8</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>9</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel submitted bank statements for the petitioner's business checking accounts covering certain months from September 2004 to December 2005. Counsel's reliance on the balances in the petitioner's bank checking accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved or pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

CIS records show that the petitioner filed another immigrant petition (EAC-03-051-55499) on December 5, 2002 with a priority date of April 27, 2001. This petition was approved on November 26, 2003 and the beneficiary of that petition obtained lawful permanent residence on June 22, 2005. Therefore, the petitioner must establish that it could pay at least two proffered wages from 2001 to 2005. The record does not contain any evidence showing that the petitioner had sufficient net income or net current assets to pay the two beneficiaries in 2002 through 2005.

Therefore, the petitioner failed to submit any regulatory-prescribed evidence to establish its ability to pay the proffered wage in 2002 through 2005.

In view of the forgoing, the AAO finds that the director was in error in approving the instant petition and would find good and sufficient cause to revoke the approval of the petition, on different grounds than those stated in the NOR. Therefore, the director's April 28, 2006 decision will be withdrawn.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

The petition is herewith remanded to the director for consideration of the issues stated above. The petitioner may provide additional evidence within a reasonable period of time to be determined by the

director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which is to be certified to the AAO for review.